IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1958

No. 960

JUAN A. ORTA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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Petitioner, JUAN A. ORTA, prays that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the Fifth Circuit entered in the above case on March 18, 1958.

OPINIONS BELOW

The District Court of the Southern District of Florida did not render an opinion, but entered an order suppressing the evidence and dismissing the indictment on August 20, 1957.

The opinion of the Court of Appeals for the Fifth Circuit is not officially reported but has been printed and can be cited as *U. S. v. Orta.*

JURISDICTION

The judgment of the Court of Appeals was made and entered on March 18, 1958, and copies thereof are appended to this petition on the appendix at pp. 3. The jurisdiction of this Court is invoked under Article 3, § 2, of the Constitution of the United States of America, and on 62 Statutes 928, and U.S.C.A. § 1254. On April 20, 1958, additional time to file petition for writ of certiorari was graciously granted to petitioner up to and including April 28, 1958 by virtue of an order from the Hon. Justice Hugo Black.

QUESTIONS PRESENTED

The questions presented are:

I.

WHETHER UNDER THE FACTS AND CIRCUMSTANCES OF THIS CASE, WERE PETITIONER'S RIGHTS UNDER THE FIFTH AMENDMENT INFRINGED?

II.

WHETHER UNDUE ADVANTAGE, COMPULSION, AND ILLEGALITY WERE USED BY THE GOVERNMENT IN OBTAINING AN INDICTMENT, AND, IF SO, SHOULD AN INDICTMENT SO OBTAINED STAND?

III.

WHETHER THE FIFTH CIRCUIT COURT OF APPEALS ERRONEOUSLY INTERPRETED THE RECORD, LAW, AND FACTS ON APPEAL, IN ARRIVING AT THE OPINION AND JUDGMENT RENDERED?

CONSTITUTION, STATUTES, FEDERAL RULES AND REGULATIONS INVOLVED

18 U.S.C., Sec. 959-60
Title 18, U.S.C. Sec. 2386
U. S. Code, Sec. 611
Article 3, § 2, United States Constitution
62 Statutes 928, U.S.C.A. § 1254

STATEMENT

A. THE BASIC FACTS:

JUAN A. ORTA, a Cuban national, was subpoenaed as a witness for the Government, and in that capacity testified before a Grand Jury which convened in Miami the 10th, 15th and 17th days of January, 1957. On the basis of said testimony, an indictment was returned against ORTA on March 27, 1957, by a subsequent Grand Jury (R. 1-7). On April 24, 1957, petitioner submitted a motion to dismiss the indictment, on the grounds that petitioner's testimony was obtained from him under undue advantage, compulsion and illegally (R. 8-1-a, b, c) in violation of his rights as guaranteed by the Fifth Amendment. A hearing on the motion was held on July 15, 1957, whereby the Judge, Emmet C. Choate, entered an order denying the motion to

dismiss and further ordering, on the Court's own motion, a new hearing to be held on Thursday, July 18, 1957, at 1:30 o'clock in the afternoon, at which time Petitioner was to be afforded an opportunity to present evidence as to the voluntariness of Petitioners' testimony in order that the Court could determine whether his testimony would be suppressed from evidence in that or any other criminal proceeding. Judge Choate orally told the attorneys for the government that he had read the record of the testimony of the Grand Jury and that in the record no warning as to Petitioners' rights appeared as having been made by the Government attorneys. Then counsel for the Government was requested to stipulate to the following:

1. Did the defendant understand English?

2. Was the defendant warned outside of the transcript of testimony of his Constitutional rights to refuse to answer questions which might tend to incriminate him?

3. Did the defendant have legal counsel prior to testifying before the Grand Jury?

4. Irrespective of legal counsel, did the defendant understand his Constitutional rights? (R. 12-13)

The Government complied with the Court's order by stating that they were not in a position to answer any of the questions above, either in the affirmative or the negative, and in support of their position submitted an attached memorandum (R. 14). It is noted that said memorandum has not been made a part of the record (R. 14).

At a hearing held on August 20, 1957, counsel for Pe-

titioner argued that the Government's response was not in accordance with the Court's order and that what they constituted, in effect, was a denial that they could prove the said facts (R. 28), whereupon the Court ordered the witnesses of Petitioner on the stand (R. 28) where they testified as to Petitioners' ignorance of the English language, that Petitioner had not consulted an attorney prior to giving his testimony, that Petitioner was ignorant of his right to remain silent, that Petitioner was a Government witness, that Petitioner had been previously investigated by the F.B.I., and Immigration Authorities, that the Grand Jury was investigating Petitioner, that Petitioner had studied at the University of Habana, that neither said Grand Jury system nor our system of law exists in Cuba, that Petitioner was compelled to answer the questions (R. 28, 29, 30, up to and including 48). Judge Choate, at the conclusion of this testimony, entered an order suppressing the testimony and dismissing the indictment (R. 16).

On appeal, the Fifth Circuit Court reversed the Court, basing its reversal on four main points:

1. The protection of the Fifth Amendment relates to crimes alleged to have been committed before the time when testimony was sought.

2. The mere possibility that the witness may later be indicted furnishes no basis for requiring that he be advised of his rights under the Fifth Amendment before giving testimony to a Grand Jury.

3. There was no showing that the Grand Jury before which Orta testified was seeking to indict him or any other person.

4 By being in agreement with the views expressed in *United States v. Parker* as applicable to the Orta situation.

ARGUMENT

The Court of Appeals erred in the application of the record, law and facts to the instant case.

This case is different. Orta was not an ordinary witness. He was, at the time of testimony, a foreigner unable to speak, read or write the English language (R. 28, 29, 30, 31), unfamiliar with our system of law and judicial bodies of inquiry, especially with the Grand Jury, an institution non-existent and unknown in Cuba (R. 28, 29). He was not a voluntary witness but appeared and testified under compulsion of a Government subpoena labelling him a witness for the Government. He was ignorant of any rights or privileges of witnesses before a Grand Jury (R. 40). His testimony was not rendered through himself, but second-hand through a Government interpreter with whom he could not get together on the answers, who was not Cuban and not adapted to Cuban colloquialisms (R. 42). The record reflects the above facts, and the uncontested fact that an interpreter was used for Orta speaks for itself (R. 41). Nowhere on the record appears that Orta was warned upon his oath of the consequences of uttering an untruth, or that he could be prosecuted for false statements (R. 21, 23). At no time to, or during the progress of the inquest, was Orta advised of any right to immunity that he might have had as a Government witness, or to any right to remain silent, or to the right to consult an attorney, in spite of the fact that the Government was, and is, well familiar with Orta's circumstances. On the contrary, the Petitioner

was sworn, told he had to testify and answer the questions "Yes" or "No" (R. 41). Orta was the first or second witness to testify (R. 42), he was told by the Government that he could not talk to anyone about what was being questioned inside, not even with a lawyer nor any other person, or tell anyone what transpired there (R. 42). The non-disclosure by the Government to Petitioner of his rights and privileges under the Fifth Amendment taken together with Petitioner's personal circumstance of ignorance, certainly gave the Government undue advantage over Petitioner, compelled Orta to testify, who, hearing and weighing the questions in fear and under duress, in ignorance of his right to remain silent, forced him into a cul de sac, and finding that the questions were against him and not Joe Doe (R. 41), was driven and inveigled, by the superior force of knowledge of the Government, into the classical dilemma of "either the fire or frying pan", in this case an indictment for perjury, by being forced to answer the questions propounded, not knowing he could refuse to answer.

In effect, what the Government through the non-disclosure of Petitioner's rights to him did was to actually deprive him of them, compelling Petitioner to testify as effectively as a Commissar extracts a confession by the expedient method of placing a pistol to the head of a prisoner—the one a pistol of steel, the other a pistol of knowledge—but having the same common denominator—duress.

United States v. Bell, (81 F. Rep. 830), which is still the law, has laid down a general rule which is consistent with our inherent sense of fair play in the administration of justice (81 F. Rep. 840);

"Can the Government take advantage of its own wrong, inveigle or drive or permit the citizen, too ignorant to protect himself, to take an oath, which he need not take under any compulsion, and then insist upon the pains and penalties of perjury that he shall tell the truth? Truth telling may be the highest virtue, but may the Fifth Amendment be violated to enforce it? We answer no.

"To avoid all such apprehension, it must be stated once and for all, that if a citizen fully cognizant of his privilege abandons it under compulsion or otherwise, any essays to speak under oath, before an authorized officer, he must speak the truth and may be prosecuted for perjury if he does not. At least these will be conceded for the present; but the ruling we make here is, that, before that principle can be invoked, it must appear, as it must appear in all cases of waiver and abandonment of rights, that the abandonment was knowingly and understandingly made and that no undue advantage was taken of the ignorance of the victim of inquisitorial examination in the process of the examination."

Orta could not waive any right, for you can not waive that of which you have no knowledge.

"Whether any given citizen has exercised his right to waive his privilege, and speak voluntarily subject to the pains and penalties of the statutes against perjury, depends upon the circumstances of each particular case, and upon those alone."

Orta could not waive any right, for you can not waive that which is non-existent so far as you know; and, from the circumstances of this case, in which the Government

has shown no warning, and on the contrary the testimony shows a lack of advice as to his rights to a foreign, ignorant witness. Hence, compulsion to testify under subpoena and non-disclosure of rights indicate conclusively that an undue advantage was taken of Orta, which makes it fatal for the indictment which has been procured by entrapment and duress, in abridgement of his Constitution rights by compelling him to be a witness against himself in a criminal proceeding. The Parker case, 244 F. 2d. 945, has been cited by the Government as the mainstay of their argument, which they claim is on "all fours" with the present case. In examining that case, we find that the Orta case is altogether different in that:

1. Orta has not been convicted of any crime. The Parker appeal is from a criminal conviction by a jury on first and second counts of perjury.

2. Orta was a foreigner unversed in the language in which testimony was given, not through his own media but through an interpreter. Parker was a native-born citizen, who testified through himself, and as a bail bondsman he, at least, must have had a certain degree of familiarity with Courts and Court proceedings.

3. Parker mounts an attack aimed at the evidentiary basis of his perjury conviction while Orta claims compulsion, omission and undue advantage of his ignorance by the Government.

4. In the Parker case, he came before the Appellate Court having been convicted of wilful and deliberate perjury, while Orta comes before this Court with not even a pending indictment against him.

5. In the Orta case, the inquiry was made to lay bare incriminating facts of past matters; not in the Parker case (R. 4).

6. In the Orta case, the Government was seeking to indict Orta if, in the inquiry they found that Orta had any knowledge of activities as follows: Had arranged certain transportation to and from divers destinations in violation of the Federal Statutes (R. 4), as it is the duty of the Government, if they determine said violations, or apprehend such violators, to prosecute them (R. 2). The testimony sought could be used as the basis for indictment against Orta. In the transcript of record and the Petitioner's brief, the Government and the Grand Jury disagree violently, the Grand Jury earmarks Orta as the target of the investigation (R. 4). While the Government states that they were not seeking to indict any particular person (BFA-5), but it is interesting to note that there is no assurance of what the Government told the Grand Jurors in the jury room, as the reporter was not there at that time and the Government dictated its position to the reporter outside the jury room (R. 20-a (1-2), but the indictment returned clearly earmarks Orta (R. p. 4).

In U. S. vs. Thomas, Fed. 49 Supp. 547, the rule that a witness can not be compelled to give incriminating testimony, and that such testimony secured by compulsion can not be used against witness, has no application where prosecution would be barred by statute of limitations, where witness has already received a pardon, where statute grants immunity with respect to such testimony, or where witness elects to save the privilege. Orta doesn't fall within any of the exemptions. He was not barred by the statute of limitations, he had not received a pardon,

he had not been granted immunity with regard to his testimony, and he had not waived any privilege that he did not even know existed.

None of the cases cited by the Government has the ground of Orta not being able to speak, read or write English, or even have a hazy conception of what the judicial body of inquiry powers were.

Let us examine the situation, and place ourselves in Orta's shoes. We are a foreigner in complete ignorance of the language and of the works of judicial bodies of inquiry in a foreign land, alone and stripped of any protection. Defenseless in a ring of foreigners in which we have been summoned by compulsion to testify for the Government, faced with the best legal talent available in the nation, Assistant Attorney General Tompkins, and another two attorneys from the Justice Department in Washington, D. C., we have gone to that place knowing only that that body has the power to make accusations. We don't know that we have any Constitutional rights. As the questioning progresses, we realize that we are testifying in a case against ourselves. Facing an accusation, we are cornered —and then it is only natural that any man would yield to the human temptation to sustain any wrongdoing he might have done by any false swearing.

Orta was in the situation where a man should, and would if properly advised, keep his mouth shut and defy those who would compel him to speak. By not knowing this, he fell into the pit.

To sustain such an indictment would be a grave miscarriage of justice.

The Court of Appeals erred in reversing the order of the District Court.

REASONS FOR GRANTING WRIT

Under the circumstances, facts and record of this case, the ruling below has decided an important question of Federal law, which has not been settled by this Court.

The decision below is in conflict with the decision of this Court in United States v. Bell (81 F. Rep. 830).

This Court should review this case to clarify the situation and assert its power so as to avoid a grave miscarriage of justice.

CONCLUSION

For the reasons, law and fact above stated, writ of certiorari should issue.

Jno P. Negretti

Attorney for Petitioner

APPENDIX

JUDGMENT

(Extract from the Minutes of March 18, 1958)

UNITED STATES OF AMERICA,

No. 16891, versus

JUAN A. ORTA

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was argued by counsel;

On consideration whereof, it is now here ordered and adjudged by the Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed; and that this cause be, and it is hereby, remanded to the said District Court for further proceedings not inconsistent with the opinion of this court.

PROOF OF SERVICE

I, Gino P. Negretti, as attorney for Juan A. Orta, petitioner herein, hereby certify that, on the 25th day of April, 1958, I served copies of the foregoing Petition for Writ of Certiorari to the Supreme Court of the United States on the United States, by leaving a copy thereof at the office of O. B. Cline, Esq., Assistant United States Attorney for the Southern District of Florida, Miami Division, at Room 234, Federal Building, Miami, Florida, and by mailing a copy, in a duly addressed envelope, with air mail postage prepaid, to The Solicitor General, Department of Justice, Washington 25, D. C.

Gino P. Negretti

GINO P. NEGRETTI

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 16891

UNITED STATES OF AMERICA,

Appellant,

versus

JUAN A. ORTA,

Appellee.

Appeal from the United States District Court for the Southern District of Florida.

(March 18, 1958.)

Before RIVES, TUTTLE and CAMERON, Circuit Judges.

RIVES, Circuit Judge: A four-count indictment was returned against Orta, each count charging the commission of perjury.[1] The several counts were based upon

[1] "§1621. *Perjury generally*

"Whoever, having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, willfully and

different portions of his testimony before the United States Grand Jury at Miami, Florida on January 10, 11 and 15, 1957.[2]

Orta filed a written motion to dismiss the indictment on the ground that his testimony, alleged to be false, had been procured in derogation of his rights under the

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contrary to such oath states or subscribes any material matter which he does not believe to be true, is guilty of perjury, and shall, except as otherwise expressly provided by law, be fined not more than $2,000 or imprisoned not more than five years, or both." 18 U.S.C.A. §1621.

2 The parts of his testimony alleged to be false and perjurious were:

First Count:

"Q. Mr. Orta, did you arrange for the transportation of a certain number of Cubans from New York to Miami?
"A. I read that in a Cuban paper. I was accused of that, but I don't know anything about that."

Second Count:

"Q. Now on December 7th, did you make any airline reservations for Eastern Airlines for nineteen individuals? Yes or No.
"A. No."

Third Count:

"Q. Mr. Orta, were you in the Pan American Air Lines office at Flagler Street and Biscayne Boulevard on December 6, 1956?
"A. I have not been there, and I would like to be permitted to add something.

* * * * *

"A. Well, I have been at that office, but on that particular day, no."

Fourth Count:
"Q. In the light of the statement you just made, Mr. Orta, did you visit the office of Mrs. Beulah Kaye, a ticket agent, Pan American Airlines ticket office on Flagler Street and Biscayne Boulevard where you asked for reservations for a party of twelve men?
"A. Me? No. I was there at that office to take out some passage for relatives of mine, but I don't even know who that lady is.

"Q. Mr. Orta, I don't expect you to know who the lady is exactly, but were you in the Pan American Airlines office on December 9th, 1956? That was a Sunday.
"A. No, sir, I was not there."

Fifth Amendment.[3] In support of that motion, he alleged that he was an involuntary witness testifying under the compulsion of a subpoena; that he was a foreigner, unversed in the English language and ignorant of his constitutional rights; that the Government, though knowing of such ignorance, failed to advise him of his rights and took undue advantage of him.

The district court heard argument of counsel on the motion and then directed that the testimony given by Orta before the Grand Jury be transcribed and submitted to the court. After examining that testimony, the district court denied the motion to dismiss the indictment; but at the same time, on its own motion, ordered another hearing and requested counsel to stipulate to answers to the following questions:

> "1. Did the defendant understand English at the time he was before the Grand Jury?
> "2. Was the defendant warned, outside of the transcript of testimony, of his constitutional right to refuse to answer questions which might tend to incriminate him?
> "3. Did the defendant have legal counsel prior to testifying before the Grand Jury?
> "4. Irrespective of legal counsel, did the defendant understand his constitutional rights, himself?"

The United States attorney advised that the Government was not in position to answer any of the four questions either in the affirmative or the negative. A

[3] "* * * nor shall any person * * * be compelled in any criminal case to be a witness against himself, * * *." Amendment 5, Constitution of the United States.

hearing was held at which Orta and three witnesses testified to Orta's ignorance of his rights and unfamiliarity with the English language. At the conclusion of the hearing, the court ordered and adjudged that Orta's testimony taken before the Grand Jury be suppressed and that the indictment be dismissed. The United States appeals from that judgment.[4]

The district court did not state its findings or issue an opinion as to its reasons for suppressing the testimony and dismissing the indictment. Both parties assume that the judgment was based on the court's opinion that the appellee's rights under the Fifth Amendment had been infringed. Upon appeal, however, we think that the issues should extend to whether the judgment was proper for any reason. Rule 41(e), Federal Rules of Criminal Procedure, provides for a pretrial hearing on a motion to suppress evidence in search and seizure cases only; and several cases have held that evidence may be suppressed *prior to indictment* only in cases where constitutional rights have been violated.[5] Clearly, however, the district court might properly conduct a pretrial hearing in this case to determine the collateral issue as to whether the evidence should be suppressed because wrongfully obtained for any reason.[6]

It is clear that the protection of the Fifth Amendment relates to crimes alleged to have been committed

[4] As permitted by 18 U.S.C.A. §3731.

[5] In re Fried, 2nd Cir. 1947, 161 F. 2d 453, 465; Centrocchio v. Garrity, 1st Cir. 1952, 198 F. 2d 382, 387; Chieftain Pontiac Corp. v. Julian, 1st Cir. 1954, 209 F. 2d 657, 659; Biggs v. United States, 6th Cir., 1957, 246 F. 2d 40, 42.

[6] See cases collected in 23 C.J.S., Criminal Law, §1060 b.

before the time when the testimony is sought. A witness, ignorant and uninformed of his constitutional rights, would not intelligently waive them if he testified, thinking that he was compelled to do so.[7] He might answer truthfully and thereafter assert the constitutional guaranty.[8] Under no circumstances, however, could he commit perjury and successfully claim that the Constitution afforded him protection from prosecution for that crime. As said in *Glickstein v. United States*, 1911, 222 U.S. 139, 142: " * * * the immunity afforded by the constitutional guarantee relates to the past and does not endow the person who testifies with a license to commit perjury."

The only debatable question is one of the supervision of the conduct of Government representatives in the interest of fairness. In *United States v. Scully*, 2nd Cir. 1955, 225 F. 2d 113, 116, the Court of Appeals for the Second Circuit held:

> " * * * the mere possibility that the witness may later be indicted furnishes no basis for requiring that he be advised of his rights under the Fifth Amendment, when summoned to give testimony before a Grand Jury."

That holding is applicable to the present record. There is no showing that the Grand Jury before which Orta testified was seeking to indict him or any other person already identified. An opening statement had been made to the Grand Jurors as follows:

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7 United States v. Scully, 2nd Cir. 1955, 225 F. 2d 113, 117, n. 1 and cases there cited.

8 See United States v. Lawn, S.D. N. Y. 1953, 115 F. Supp. 671, 177.

"MR. LENVIN: My name is Nathan Lenvin and I am the Chief of the Registration Section of the Internal Security Division of the Department of Justice. My main responsibility is the enforcement and administration of the Foreign Agents Registration Act of 1938, as amended, and the Voorhees (sic) Act. The Foreign Agents Registration Act requires the registration with the Attorney General of any person who acts within the United States as an agent of a foreign principal, and the Voorhees (sic) Act requires the registration with the Attorney General of an organization which advocates the overthrow of a government, not necessarily the government of the United States, by the use of force or violence, or which advocates the use of such means for the overthrow of a government.

"We have received information that there are individuals and organizations within the United States who had been acting as agents of an underground movement in Cuba and who had advocated the violent overthrow of the Batista Government in Cuba. At this time this information is not sufficiently specific to warrant a request of the grand jury for the return of an indictment, but we are anxious to conduct an investigative proceeding before this grand jury to determine exactly, if we can, what these groups and individuals have been doing within the United States which may be in violation of federal statutes. It may be that at the close of this proceeding the evidence will be sufficient to warrant submitting this matter for your consider-

> tion for the return of an indictment, but at this stage of the proceeding we are simply engaged in an exploratory procedure."[9]

An almost identical factual situation was faced by the Seventh Circuit in *United States v. Parker*, 1957, 244 F. 2d 943, and in an able opinion by Judge Finnegan it was held that the failure to apprise the witness of his privilege against self-incrimination did not make his perjurious testimony illegally obtained evidence. The views there expressed, with which we are in full agreement, make further discussion in this case unnecessary.[10]

Perjury is one of the most elemental of all crimes. Every sane person from the beginning of time has recognized its moral iniquity. No one can fail to know that any civilized system of laws must denounce perjury because it pollutes the very fountainhead of justice.

The judgment is reversed and the cause remanded for further proceedings not inconsistent with this opinion.

REVERSED AND REMANDED

[9] For the Foreign Agents Registration Act, see 22 U.S.C.A. §611, et seq.; for the Voorhis Act, see 18 U.S.C.A. §2386.

[10] See also, Shinyu Noro v. United States, 5th Cir. 1954, 148 F. 2d 696, 699; Claiborne v. United States, 8th Cir. 1935, 77 F. 2d 682, 690; United States v. Miller, E.D. Pa. 1948, 80 F.Supp. 979, 981; United States v. Cason, W.D. La. 1941, 39 F.Supp. 731, 734.